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No. 90-464

In the Supreme Court of the United States

OCTOBER TERM, 1990

BITUMINOUS COAL OPERATORS' ASSOCIATION, INC.,
PETITIONER

v.

UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION, AN UNINCORPORATED ASSOCIATION, BY THOMAS RABBIT, TRUSTEE AD LITEM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

H. YALE GUTNICK
STRASSBURGER MCKENNA GUTNICK & POTTER
322 Boulevard of the Allies
Pittsburgh, PA 15222
(412) 281-5423

ROBERT A. DUFEK
PETER BUSCEMI *
STANLEY F. LECHNER
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7190

Attorneys for Petitioner Bituminous Coal Operators' Association, Inc.

* Counsel of Record

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INTRODUCTION

On November 5, 1990, this Court invited the Solicitor General to file a brief expressing the views of the United States in this case. The government submitted its brief on February 8, 1991. Petitioner Bituminous Coal Operators' Association, Inc. ("BCOA") now responds to the government's submission.

Although the government opposes BCOA's petition for a writ of certiorari, its brief actually demonstrates why review should be granted in this case. The government contends that the case law applying this Court's decision

in *Firestone* is clear, but the government's own discussion of the relevant decisions belies that contention. The government is unable to articulate a principled basis to reconcile several rulings by the federal courts of appeals reaching conflicting results in similar factual situations. The conflict in the circuits directly affects the trustees involved in this case. Their eligibility determinations now are given deference in the Fourth Circuit, and are subject to *de novo* review in the Third Circuit. The Court should grant certiorari to resolve this conflict.

In addition, the government's brief attempts to gloss over the disturbing reality of this case; namely, that the lower court has rewritten and is on the verge of destroying a major, private, employee benefit fund. Incredibly, the government supports the lower court's decision, which doubles the number of beneficiaries in the fund, even though the government does not dispute the critical fact that not one single individual declared eligible by the lower court satisfies the fund's written eligibility criteria. This is directly contrary to federal law that requires fiduciaries to make eligibility determinations "in accordance with the documents and instruments governing the plan . . . ." 29 U.S.C. § 1104(a)(1)(D). Hence, this case vividly illustrates the mischief that has developed as a result of the misapplication of this Court's decision in *Firestone*. Under the guise of *de novo* review, a federal court can now usurp the role of a fund's trustees, discard the fund's eligibility requirements, pronounce a whole new class of individuals eligible for benefits, and still get the government's stamp of approval. Only a serious misreading of *Firestone* could produce such a result, and only a clarification of *Firestone* by this Court can protect employee benefit funds from such unwarranted judicial intrusion.

ARGUMENT

I. THE GOVERNMENT'S BRIEF CANNOT EXPLAIN AWAY THE CONFLICT AND CONFUSION THAT HAVE ARISEN IN THE APPLICATION OF *FIRESTONE* BY THE LOWER FEDERAL COURTS.

In *Firestone*, this Court significantly altered the landscape of employee benefits law, and created a new test for federal courts to follow when reviewing the eligibility determinations of plan administrators and fiduciaries. The Court held, in a repeatedly quoted but rarely explained passage, that eligibility determinations are subject to *de novo* review unless the benefit plan gives the plan administrator or fiduciary "discretionary authority to determine eligibility for benefits or to construe the terms of the plan." 489 U.S. at 115. This 15-word test needs to be clarified. Private litigants and the lower courts do not know what it means or how it should be applied. The government's brief only adds to the confusion.

First, the government acknowledges that there has been a flood of litigation (approximately 70 decisions by the federal courts of appeals) concerning the meaning and application of *Firestone*, even though the decision was issued just two years ago. This substantial quantity of litigation reflects the significant uncertainty that remains even after *Firestone* regarding the proper standard of judicial review of fiduciaries' eligibility determinations.

Second, the government attempts to reconcile scores of appellate cases applying *Firestone*, but its analysis raises more questions than it answers. For example, the government remarkably avoids expressing any view whatever concerning the central argument advanced by respondents—that unless a fiduciary has discretionary authority "to set and change" eligibility standards, his eligibility determinations are not entitled to any deference. As we discussed in our reply brief, however, this is a dangerous misreading of *Firestone* that will improperly thrust

the federal courts into the role of trust fund administrators and fiduciaries. The government's failure to address respondents' central argument to this Court is inexplicable and raises serious questions about the government's position.

Third, despite all of its straining, the government cannot help but admit some of the key points made by petitioner. The government concedes that the *Firestone* test has been applied, and will continue to be applied, to plans, such as the 1974 Benefit Plan at issue here, that were established, and whose trust documents were drafted, long before the decision in *Firestone*. The government concedes that the courts of appeals "have engaged in some fine line-drawing" in those cases. Brief at 12. The government further concedes that courts of appeals have reached different results in construing very similar plan language. *Id.* at 13. Similar delegations of authority to plan trustees have resulted in a deferential standards of review in some cases, and *de novo* review in others. *Id.*, comparing *De Nobel* (4th Cir.), *Curtis* (1st Cir.), and *Lowry* (5th Cir.) with *Baxter* (8th Cir.) and *IBEW Local 47* (9th Cir.). If these conflicting results do not show confusion in the circuits, it is difficult to imagine what would.

Nevertheless, the government suggests that it is understandable for courts of appeals to reach conflicting results when the delegation of authority to plan administrators and fiduciaries arguably is "ambiguous." But as the government's brief demonstrates, ambiguity is in the eye of the reviewer. Broad delegations of authority such as "full authority * * * with respect to administration of coverage and eligibility" suddenly become words of limitation. Under the government's approach, any time a court wishes to second-guess fiduciaries and overturn their eligibility determinations, all it has to do is pronounce the delegation of authority to them as "ambiguous." That cannot be what this Court intended in *Firestone*.

Fourth, in attempting to reconcile decisions such as *Baxter v. Lynn*, 886 F.2d 182 (8th Cir. 1989), and *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075 (4th Cir.), *cert. denied*, 110 S. Ct. 281 (1989), the government further confuses the issue by stating that it is appropriate, in determining the standard of review, for a court to consider "the nature of the particular trustees' decision" at issue in the dispute. Brief at 14 and n.17. Why this has any bearing on the critical inquiry under *Firestone*—whether the trustees have been granted "discretionary authority to determine eligibility for benefits or to construe the terms of the plan"—is not explained. Apparently the government agrees with the anomalous view suggested by *Dzinglski*—that easy decisions are subject to *de novo* review, while hard ones require greater deference to the views of a plan fiduciary or administrator. This novel approach makes no sense and finds no support in *Firestone*.

Fifth, the government's brief reflects the fiction that is being created to justify a *de novo* standard of review in this case. The UMWA Health and Retirement Funds consist of four closely-related funds that were created in collective bargaining by BCOA and the UMWA. The four funds were created at the same time, provide health and retirement benefits to related groups of retired coal miners and their dependents, and function as a single organization. All of the funds are run by the same board of trustees and the same administrative staff of about 340 individuals. The trustees exercise identical power and authority over each of the four funds, including the power and authority to decide who is eligible for benefits. Continuously, for more than a decade, these trustees have decided thousands of disputes over who is eligible for benefits from each of the four funds. No one, including the UMWA, ever suggested before *Firestone* that the trustees did not have "discretionary authority to determine eligibility for benefits or to construe the terms of the plan[s]." That is precisely what these trustees

have done for years, and what they get paid substantial sums to do.

After this Court's decision in *Firestone*, however, many individuals who have been denied benefits by the trustees have seized upon the *Firestone* decision and challenged the trustees' authority, in an effort to obtain *de novo* review of the trustees' denial of benefits. As a result of the lower court's decision in this case, the trustees are now facing conflicting judicial interpretations of their authority. The trustees' eligibility determinations concerning the 1974 *Pension* Plan are now entitled to deference based on decisions such as *Boyd v. Trustees of the UMW Health & Retirement Funds*, 873 F.2d 57 (4th Cir. 1989), and *Richards v. UMW Health & Retirement Fund*, 895 F.2d 133 (4th Cir. 1990), but their eligibility determinations concerning the 1974 *Benefit* Plan, based on this case, are not entitled to any deference, and are subject to *de novo* review.

These conflicting results are not justified by any real differences in authority granted to the trustees by the settlors of the Funds—BCOA and the UMWA. As noted above, the trustees of the 1974 *Pension* Plan operate with precisely the same amount of authority and discretion as the trustees of the 1974 *Benefit* Plan. Prior to the decision in this case, no court had ever held otherwise. Indeed, in *District 17, UMW v. Allied Corp.*, 765 F.2d 412 (4th Cir.) (en banc), *cert. denied*, 473 U.S. 905 (1985), the Fourth Circuit expressly ruled that the 1974 *Benefit* Plan "empowers the Trustees to interpret the provisions of the Trust." 765 F.2d at 416. This is directly contrary to the conclusion of the lower court, and the submission of the government, in this case.

The government attempts to bury the *Allied* case in a footnote (see Brief at 16 n.21) and incredibly suggests, without support, that the Fourth Circuit would somehow reach a contrary decision today, after *Firestone*. This argument shows the fantasy world that the government

and the district court have created to strip the Fund's trustees of their recognized authority. Similarly, the government argues that it is significant that the 1974 *Pension* Plan expressly gives the trustees authority to promulgate rules and regulations, but the 1974 *Benefit* Plan does not. Brief at 17 n.22. But as shown in *Allied*, the trustees of the 1974 *Benefit* Plan have undisputed authority to promulgate rules and regulations, and have exercised that authority on numerous occasions, through the use of a "Question and Answer" system for establishing uniform rules of interpretation of the Plan's terms. *See Allied*, 735 F.2d at 131.

Finally, the government suggests that "any difficulty" and "any uncertainty" in applying *Firestone* are merely temporary because the plans in dispute were written before *Firestone*, and can now be amended with *Firestone* in mind. Brief at 14-15. This assertion, however, ignores the serious conflict that fiduciaries are facing now, and the irreparable harm that these decisions are causing employers. For example, the lower court's decision in this case has already added thousands of beneficiaries to the rolls of the 1974 Benefit Plan, has already cost employers more than $10 million, and continues to cost employers more than $600,000 *per month*. These expenses have been incurred for medical services already rendered, and employers have no reasonable prospect of getting their money back, especially in light of the fact that the district court's bond was limited to $500,000. Further, the collective bargaining agreement in this case has a five-year term that runs until February 1, 1993, and the Union, having prevailed below, can hardly be expected to agree to any amendment that might jeopardize the lower court's decision. The Union is perfectly happy with that ruling, since it provides from the courts a benefit that the Union was unable to obtain at the bargaining table.

In summary, the government's attempt to reconcile the conflicting decisions applying *Firestone* defies reality and

illustrates the confusion that has arisen under *Firestone*. In the real world, the trustees of the UMWA Funds exercise identical authority over each of the Funds, and no one denies it. On paper, the grants of authority to the trustees are not stated in precisely the same words for each Fund, so there is room for skillful lawyers and judges to create ambiguity to attempt to justify their desired result. This unprincipled and result-oriented approach, however, is a dangerous application of *Firestone*, and will undermine the proper administration of employee benefit plans throughout the country.

II. UNLESS THIS COURT GRANTS REVIEW AND CLARIFIES ITS DECISION IN *FIRESTONE*, THE COURTS BELOW WILL HAVE REWRITTEN AND SERIOUSLY JEOPARDIZED A MAJOR EMPLOYEE BENEFIT PLAN.

In BCOA's petition for certiorari, we informed the Court of several critical facts that are not in dispute in this case. First, the 1974 Benefit Plan is funded exclusively by employers such as BCOA member companies that are signatory to a collective bargaining agreement with the UMWA. Second, the 1974 Benefit Plan has written eligibility requirements that were bargained for by BCOA and the UMWA, and those requirements limit eligibility under the Plan to pensioners whose last employer in the coal industry is "no longer in business." Third, *none* of the pensioners in this case satisfy the Plan's eligibility criteria because they all formerly worked for companies that admittedly are still operating in the coal business, albeit on a nonunion or nonsignatory basis. Fourth, all of these companies refused to sign a successor agreement with the Union, stopped contributing to the Plan, and then dumped their retirees into the Plan to obtain health care financed by BCOA members and other signatories. See Pet. at 7-8.

Neither respondents nor the government denies these facts. Remarkably, in this eligibility dispute, even the

government tries to run away from the Plan's eligibility requirements. Instead, the government appears to endorse the Union's "lifetime benefits for everyone" approach, which renders the Plan's eligibility criteria nugatory and ignores uncontroverted evidence regarding the Plan's collective bargaining history and the contemporaneous understanding of the parties. See Reply Brief for Petitioner at 7-9 and Appendices A and B. In short, without addressing any of this evidence, the government is now supporting the absurd result of the district court—that BCOA negotiated eligibility requirements that require its members to pay for the retiree health costs of their non-union competitors.

If this holding is permitted to stand, the 1974 Benefit Plan will fail, and thousands of its legitimate beneficiaries will be left without benefits. Many employers will seek to take advantage of this decision by refusing to sign another contract with the Union, and then dumping their retiree health costs into the Fund for payment by their competitors. Obviously, BCOA member companies and other signatory employers cannot survive in a competitive marketplace by paying the labor costs (especially expensive retiree health costs) of their competitors.

The government belatedly acknowledges this point at the very end of its brief by stating in a footnote that it "shares petitioner's concern with respect to the long-term financial viability of the plan at issue." Brief at 19 n.24. But the government offers no solutions to the catastrophe that the lower courts have created. It is easy for the government to pronounce everyone eligible for health benefits under a private plan, especially when the government is not paying for those benefits. But it should not be so easy, under the proper interpretation of *Firestone*, for a federal court to usurp the role of a plan's trustees and disregard a plan's eligibility requirements. Review by this Court is necessary to safeguard benefits plans from such improper and misguided judicial intrusion.

CONCLUSION

For all of the foregoing reasons, as well as the reasons stated in BCOA's petition and reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

H. YALE GUTNICK
STRASSBURGER MCKENNA
GUTNICK & POTTER
322 Boulevard of the Allies
Pittsburgh, PA 15222
(412) 281-5423

ROBERT A. DUFEK
PETER BUSCEMI *
STANLEY F. LECHNER
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7190

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